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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

THE STATE OF COLORADO,
Petitioner,
vs.
LESLIE BENJAMIN LaFRANKIE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case No. 92SA476

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QUESTION PRESENTED FOR REVIEW

Whether it is appropriate to determine "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966) by inquiring whether a reasonable person would believe "that he is deprived of his freedom of action in any significant way," and "not free to leave," but without consideration of whether there were restraints imposed by police "of the degree associated with formal arrest" under *Beheler v. California*, 463 U.S. 1121 (1983), *Minnesota v. Murphy*, 465 U.S. 420 (1984), and *Berkemer v. McCarty*, 468 U.S. 420 (1984)?

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OPINIONS BELOW

The motion to suppress is Appendix A. The transcript of the trial court's ruling is Appendix B. The Colorado Supreme Court opinion, which has been reported at 858 P.2d 702, is Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

This petition involves an interlocutory appeal by the prosecution of an order suppressing statements made by the respondent to police. On October 4, 1993, the Colorado Supreme Court affirmed the trial court's order and issued its mandate. No

petition for rehearing is permitted in such cases under Colorado appellate rules. Colo. R. App. P. 4.1(g).

CONSTITUTIONAL AND RULE PROVISIONS

Amendment V of the United States Constitution provides in pertinent part: "No person ... shall be compelled, in any criminal case, to be a witness against himself...."

Amendment XIV, § 1 of the United States Constitution provides, in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE FACTS

The respondent LaFrankie was employed by Hi-Tech Manufacturing. A computer had been stolen from Hi-Tech. The employer suspected LaFrankie because he had access to the computer and because of certain statements he made and suspicious actions he took after the theft. The employer reported the theft and the suspicions to police. Two detectives went to LaFrankie's place of employment to investigate.

A company administrator brought LaFrankie from his work place to the administrative area, where the detectives asked him if "he had a few minutes to talk to us" about the theft. LaFrankie agreed to talk to them, saying that he wanted to get the matter straightened out. The detectives questioned him in the president's office. LaFrankie first denied having taken the computer. He said, however, that he had recently bought a computer at a garage sale, and he feared that it might be the stolen computer. The detectives emphatically told him several times that they did not believe his story and urged him to tell the truth. They told him that even if he confessed he would not be taken into custody, but that his case would be referred to the District

Attorney for issuance of a felony summons. After about thirty minutes, he admitted the theft. LaFrankie then took the detectives to his home and turned over the stolen computer. He was not arrested; rather, over a month later, a summons was issued ordering him to appear in court.

STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS RAISED

The Respondent filed a motion to suppress statements and evidence in the trial court, alleging that "the circumstances created a de facto custody situation," so that "the requirements of the *Miranda* decision and its progeny apply." Pet. App. at A-2. The trial court, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and not independent state grounds, found the interrogation to be custodial and suppressed Mr. LaFrankie's statements because of the absence of *Miranda* warnings, explaining that:

> ... since the purpose of the interview was to get the defendant to confess, that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. That is what *Miranda* is about, otherwise *Miranda* doesn't mean anything.

Pet. App. at B-3.

After finding the setting to be custodial based on the circumstances of the interview, the court analyzed those same circumstances and found that the statements were voluntary because the officers were truthful, no overt threats or promises were made, the style of the questioners was low key and not calculated to overbear the defendant's will, and the defendant was sufficiently

sophisticated and experienced. Pet. App. at B-4, B-5.

THE DECISION OF THE COLORADO SUPREME COURT

On appeal, the Colorado Supreme Court affirmed the suppression order of the trial court. Although it found the trial court's statement of "what *Miranda* is about" to be "misleading,"[1] the Colorado Supreme Court nonetheless held that the trial court correctly found the setting to be custodial. The Colorado Supreme Court placed particular emphasis on the fact that LaFrankie was interviewed at his workplace, stating: "there can be few places more intimidating or potentially coercive to an individual than one's place of employment." Pet. App. at C-8 n.10. In addition to emphasizing the place of the interview, the Supreme Court found the 15' by 15' size of the room where the interview was conducted, the presence of only the two detectives in the room, the purpose, length, and accusatory nature of the interview, the fact that respondent was not informed he was free to leave, and the fact that his statements were not "volunteered," Pet. App. at C-8, C-9, supported the trial court's conclusion that the respondent was in custody "because the defendant was interviewed by the police for the purpose of obtaining a confession and because the defendant reasonably believed he was not free to leave." Pet. App. at C-2. The Supreme Court began its analysis of this determination of custody by emphasizing that "Custody is not limited to those situations in which a formal arrest has taken place, but also includes those situations where the person interrogated 'has been significantly deprived of his freedom of action.'" Pet. App. at C-5.

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[1] The Court correctly observed that *Miranda* advisements are not required "anytime a police officer's actions are motivated by a desire to obtain a confession or other information from a suspect;" however, the Court also said in this context that "the purpose of the encounter is one of the prominent factors which should be considered in determining if a reasonable person would feel deprived of his freedom of action in a significant way." Pet. App. at C-7 n.8.

REASONS TO ISSUE THE WRIT

I. INTRODUCTION

The appropriate test for the determination of "custody" for purposes of *Miranda* has been stated repeatedly by this Court: a determination of custody must be based upon formal arrest or imposition by the police of restraints of the degree associated with arrest. *Beheler v. California*, 463 U.S. 1121, 1125 (1983); *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984); and *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The Colorado Court applied a test for custody under which lesser restraints than those associated with arrest can trigger *Miranda's* requirements and which is, therefore, substantially different from and broader than the test established by this Court.

In spite of the clarity with which this Court has linked custody to the imposition of significant restraints associated with arrest, there continues to be widespread confusion in Colorado and in other jurisdictions concerning when the requirements of *Miranda* are applicable. This confusion persists because many lower courts continue to give independent meaning to the definition of "custodial interrogation" in *Miranda* -- "or otherwise deprived of his freedom in any significant way" -- instead of recognizing the clarification of that definition provided in *Beheler*, *Berkemer*, and *Murphy*. It is also the result of the failure of many lower courts to distinguish properly between more limited Fourth Amendment seizures on the one hand and arrests on the other when making determinations of custody for purposes of the Fifth Amendment.

Instead of recognizing the limitations this Court has proscribed for the application of *Miranda*, by requiring restraints associated with arrest for there to be custody, the Colorado Supreme Court analyzed "custody" to make *Miranda* applicable in a broad range of situations. Decisions from other jurisdictions demonstrate

that Colorado is not alone in its failure to appreciate the significance of this Court's refinement of the meaning of custody.

The cost to society of this inappropriately expansive approach to *Miranda* is demonstrated by this case. Reliable and voluntary admissions of criminal responsibility are kept from the fact-finder, and criminal cases often have to be dismissed, because of the suppression of the statements given under circumstances which are outside the concerns addressed in *Miranda* and its progeny. The Writ should be issued to eliminate this widespread misapplication of *Miranda* and its progeny.

II. ARGUMENT

A. The U.S. Supreme Court Has Established That Custody Requires Formal Arrest or Restraints to a Degree Associated with Formal Arrest.

This Court originally defined custodial interrogation to mean questioning "after a person has been taken into custody or otherwise deprived of his freedom in any significant way." *Miranda*, 384 U.S. at 444. Since one is usually taken into custody through arrest, this two pronged definition of custodial interrogation suggested that the requirements of *Miranda* were triggered not only by arrest, but also by other restraints on freedom which might be less significant than arrest.

Lower courts applied various approaches to determine whether one is "otherwise deprived of his freedom in any significant way." In reviewing such decisions, this Court has rejected the fact that the defendant was the "focus" or the "suspect" as the test for custody. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Beckwith v. United States*, 425 U.S. 341 (1976). This Court has likewise rejected

the idea that *Miranda* applies simply when there is a "coercive environment" emphasizing that:

> *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Mathiason, 429 U.S. at 495.

In *Beheler*, the lower court again found, in spite of *Mathiason*, that a station house interview was custodial because of its inherently coercive environment even without any indicia of arrest. This Court reversed and linked custody to arrest by stating that in determining whether one is in custody for purposes of *Miranda*:

> [t]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with formal arrest.

Beheler, 463 U.S. at 1125. This Court has also said:

> Under the narrower standard appropriate in the *Miranda* context, it is clear that Murphy was not "in custody" for purposes of receiving *Miranda* protection since there was no "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

Murphy, 465 U.S. at 430.

This Court then rejected, as irrelevant, the subjective intent of the police as a basis for finding custody, *Berkemer*, 468 U.S. at 442, and again emphasized that,

> It is well settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest."

Berkemer, 468 U.S. at 440. This Court has repeatedly stated that custody requires significant restraints, which are to be measured in terms of the police domination associated with arrest.

B. The Colorado Supreme Court's Test for Custody, Like The Tests Applied in Many Other Jurisdictions, Does Not Include Whether There Are Restraints Associated With Arrest.

Neither the majority nor the dissent below cited *Beheler*, *Murphy*, or *Berkemer*, nor did either opinion state the test for custody in terms of restraints which are "to a degree associated with arrest." The Colorado Court has ignored the test articulated by this Court in numerous other cases as well.[2] Instead, the Colorado Court has

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[2] *People v. Thiret*, 685 P.2d 193 (Colo. 1984); *People v. Black*, 698 P.2d 766 (Colo. 1985); *People v. Harper*, 726 P.2d 1129 (Colo. 1986); *People v. Sandoval*, 736 P.2d 1201 (Colo. 1987); *People v. Cleburn*, 782 P.2d 784 (Colo. 1989), *cert. denied*, 495 U.S. 923 (1990); *People v. Julian Trujillo*, 784 P.2d 788 (Colo. 1990); *People v. Lupy Trujillo*, 785 P.2d 1290 (Colo. 1990); *People v. Horn*, 790 P.2d 816 (Colo. 1990); *People v. Probasco*, 795 P.2d 1330 (Colo. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 558 (1990); *People v. Gennings*, 808 P.2d 839 (Colo. 1991); *People v. Hamilton*, 831 P.2d 1326 (Colo. 1992); *People v. Thomas*, 839 P.2d 1174 (Colo. 1992); *People in the Interest of J.C.*, 844 P.2d 1185 (Colo. 1993); *People v. Haurey*, 859 P.2d 889 (Colo. 1993).

Only in traffic cases has the Colorado Supreme Court applied the test of restraints "to a degree associated with arrest." *People v. Archuleta*,

continued to rely on the original language defining custodial interrogation in *Miranda* -- "deprived of his or her freedom of action in any significant way."

In *Berkemer*, the defendant relied heavily on this phrase from *Miranda* to support its position that roadside questioning was custodial. This Court declined "to accord talismanic power" to that phrase, *Berkemer*, 468 U.S. at 435-436, and instead emphasized that *Miranda* does not become applicable until the suspect's freedom of action is curtailed to a "degree associated with formal arrest." *Berkemer*, 468 U.S. at 440. The Colorado Court has, nonetheless, continued to give talismanic power to the language of being deprived of freedom of action "in any significant way."

The Court below said, "Custody is not limited to those situations in which a formal arrest has taken place, but also includes those situations where the person interrogated 'has been significantly deprived of his freedom of action.'" Pet. App. at C-5. In a like manner, in the few cases in which the Colorado Court has referred to the constraints "associated with formal arrest," it has taken that language out of context and understated its significance. The Court has said:

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719 P.2d 1091 (Colo. 1986); *People v. Wallace*, 724 P.2d 670 (Colo. 1986); and *People v. Milhollen*, 751 P.2d 43 (Colo. 1988). To apply this test only to traffic situations is to focus too narrowly on the facts, rather than the reasoning, of *Berkemer*. The test applied in *Berkemer* was also applied in *Beheler* and *Murphy*, both of which were murder cases, and this test was derived from *Beckwith*, *Mathiason*, and *Miranda* itself, none of which was a traffic case.

The Colorado Court has cited *Beheler*, *Murphy*, and *Berkemer* on occasion, but only to support the objective or case by case nature of the determination of custody. *E.g.*, *Harper*, 726 P.2d at 1131; *Julian Trujillo*, 784 P.2d at 791 n.2; *Lupy Trujillo*, 785 P.2d at 1293; *Gennings*, 808 P.2d at 845; *Hamilton*, 831 P.2d at 1330.

> A person obviously is in custody when that person is subjected to the constraints associated with a formal arrest. The *Miranda* requirements, however, are not limited to formal arrests, but also include police interrogation conducted under circumstances where the person interrogated has been significantly deprived of his freedom of action.

People v. Julian Trujillo, 784 P.2d 788, 791 (Colo. 1990). *People v. Thomas*, 839 P.2d 1174, 1178 (Colo. 1992). Where this Court has explained that custody requires formal arrest or restraints to a degree associated with formal arrest, the Colorado Court finds situations to be custodial if there are other significant, but undefined, deprivations of freedom which are to a degree less than arrest.

The Colorado Court has overlooked the significance of "restraints associated with formal arrest" as the test for custody under *Beheler*, *Murphy*, and *Berkemer*, relegating the "ultimate inquiry" for custody established by this Court to the determination of only the "obvious" examples of custody. The Colorado Court has continued to give controlling effect to the unrefined language from *Miranda*, the significance of which this Court minimized in *Berkemer*, and applies that language unconstrained by any association with arrest, thereby expanding the situations in which compliance with *Miranda* is required.

Numerous courts have recognized that *Beheler*, *Murphy*, and *Berkemer* require the determination of custody to be based on restraints to a degree associated with arrest.[3] On the other hand,

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[3] *E.g.*, *Davis v. Allsbrooks*, 778 F.2d 168, 171 (4th Cir. 1985) (*Beheler* "articulated the standards by which 'custody' is to be judged"); *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988) (describing the meaning of custody as having been refined by *Beheler*, *Berkemer*, and *Murphy*, which undermined the test previously applied in that Circuit); *Wunder v. State*, 705 P.2d 333, 334 (Wyo. 1985)

other jurisdictions have, like Colorado, overlooked the significance of this Court's decisions in *Beheler*, *Murphy*, and *Berkemer*, and have relied instead on an inappropriate emphasis of the language from the original *Miranda* decision. For example, the California Court has said that custody "occurs if the suspect is physically deprived of his freedom of action in any way or is led to believe, as a reasonable person, that he is so deprived." *People v. Stansbury*, 846 P.2d 756, 775-776 (Cal. 1993), *cert. granted*, *Stansbury v. California*, 114 S. Ct. 380 (1993). The California Court applied this language with particular emphasis on the four "most important considerations," to hold that, "[t]he trial court's determination that the suspicion focused on the defendant only when he mentioned that he had driven a turquoise car on the night of the crime is supported by substantial evidence." *Stansbury*, 846 P.2d at 775-776. The Court did not ask whether that fact alone or with others established the functional equivalent of arrest.

Other examples of reliance on the unrefined definition of custodial interrogation from *Miranda* include: *Wallace v. State*, 813 S.W.2d 748, 750 (Texas Crim. App. 1991) (stating "One factor used by courts is whether a reasonable person would believe his freedom was being deprived in a significant way," but emphasizing that the officer lacked probable cause to arrest, without discussing whether police imposed restraints comparable to arrest); *State v. Furlough*, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990) (emphasizing that

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(describing *Berkemer* as having "further defined the test for 'taken into custody or otherwise deprived of his freedom of action"); *State v. Harris*, 725 P.2d 975, 978 (Wash. 1986), *cert. denied*, 480 U.S. 940 (1987) (*Berkemer* "elucidated the test" for the application of *Miranda*, requiring it to modify the "probable cause to arrest" standard it had previously applied); *State v. Fritschen*, 802 P.2d 558, 563-564 (Kan. 1990) (stating that prior analysis in Kansas for custody had "developed without significant reference to any post-*Miranda* United States Supreme Court cases" and was not "entirely consistent with" those cases); *State v. Medrano*, 844 P.2d 1364, 1367 (Idaho App. 1992) (*Berkemer* "refined" the meaning of being "deprived of his freedom by the authorities in any significant way").

"[t]he investigation has focused on the defendant as the prime suspect" in applying the test of "whether she was 'deprived of her freedom of action in any significant way,'" without discussing restraints in terms of arrest); *Shiplet v. State*, 732 S.W.2d 622, 624 & 629 (Texas Crim. App. 1985) (*en banc*) (beginning the analysis with the language "otherwise deprived of his freedom of action in any significant way," then acknowledging that various factors used by different courts to apply this test involve "intermingling the focus concept that some courts use with the subjective concept that other courts use..." and then applying such factors without linking them to restraints associated with arrest).

Another court acknowledged the "ultimate inquiry" from *Beheler*, but proceeded to describe the test for that inquiry to be whether a reasonable person would have felt under arrest or "otherwise deprived of his freedom of action in any significant way." *Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987), *cert. denied*, 486 U.S. 1024 (1988). Under such an approach, which is comparable to that followed in Colorado, the earlier language from *Miranda* is used to refine the later language from *Beheler*, instead of the other way around. The court in *Cobb* relied on the facts that the defendant was not told he was a suspect or charged, and that the police had no basis for charging him, rather than on whether they imposed restraints which are associated with arrest.

The critical defect in relying on this language from *Miranda* alone is that it provides no guidance for determining when the deprivation of freedom of action is "significant" enough to establish actual custody. This allows for an expansive, rather than a limited, application of *Miranda*. It was this defect which this Court first rectified in *Beckwith* and *Mathiason*, with an emphasis on actual custody, and then resolved more completely in *Beheler*, *Murphy*, and *Berkemer*, with the emphasis on restraints imposed by police to a degree associated with arrest. Many jurisdictions, including Colorado, do not apply the language from *Miranda* through the more precise meaning this Court has since given it.

C. The Colorado Supreme Court and Many Other Jurisdictions Equate Custody With Feeling "Not Free to Leave," Which is The Test For Seizures Less Restrictive Than Arrest.

The Colorado Supreme Court referred favorably to the trial court's consideration of the fact that the respondent was not told he was "free to leave" and to the trial court's conclusion that the respondent was not aware that he was "free to leave." Pet. App. at C-2, C-4, C-8 & C-10. The Colorado Court, like many others, equates custody with being "not free to leave."

The words "not free to leave" have been used to describe a prerequisite for Fourth Amendment seizures, and particularly for investigatory stops under *Terry v. Ohio*, 392 U.S. 1 (1968). *California v. Hodari D.*, __ U.S. __, 111 S. Ct. 1547, 1551 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Fourth Amendment issue for which this phrase is applied is the determination of whether "the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen." *Hodari D.*, 111 S. Ct. at 1550, quoting *Terry*, 392 U.S. at 19 n.16. A seizure occurs if the use of force or show of authority by police was to such an extent that one would reasonably felt "not free to leave."

The Colorado Court cited *Mendenhall* and equated all Fourth Amendment seizures in terms of being "not free to leave," and then said, "... the standards to be employed in determining the meaning of 'custody' under the Fifth Amendment for purposes of *Miranda* and 'seizure' for purposes of the Fourth Amendment are identical...." *People v. Johnson*, 671 P.2d 958, 961-962 (Colo. 1983). The Colorado Court has recently said, "The essential element of custody is that a reasonable person in the suspect's position would feel that he is not free to leave ..." *Thomas*, 839 P.2d at 1179.

Even if there is a Fourth Amendment seizure, however, it is not necessarily true that there is custody triggering *Miranda* under the Fifth Amendment. In contrasting custody to a traffic stop, which was acknowledged to be a Fourth Amendment seizure comparable to an investigatory *Terry* stop, this Court said,

> [t]he comparatively non-threatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.

Berkemer, 468 U.S. at 440. Restraints such as *Terry* stops and traffic stops, which are Fourth Amendment seizures of a degree less than formal arrest, do not, therefore, effect custody and, for that reason, do not implicate *Miranda*.

Contrary to the premise of the Colorado Court for the determination of custody, all Fourth Amendment seizures, under which one is not free to leave, do not trigger the requirement for *Miranda* warnings. The seizure, *i.e.* the use of physical force or show of authority, must be greater than a *Terry* stop and must involve restraints to a degree associated with arrest. Yet the Colorado Court applies the test for any seizure, even those which are less restrictive than an arrest, to determine custody.

Some courts have recognized that being "not free to leave" is the test for a lesser degree of seizure, which is not significant enough to implicate *Miranda*. For example, the Fifth Circuit has said:

> We know that "a person has been 'seized' within the meaning of the Fourth Amendment only if, ... a reasonable person would have believed that he was not free to leave." But a Fourth Amendment seizure does not necessarily render a person in custody for purposes of *Miranda*.... "[T]he core meaning both of 'seizure' in the Fourth Amendment sense, and

> 'custody' in the *Miranda* sense, appears to be the same: the restraint of a person's 'freedom to walk away' from the police." The critical difference between the two concepts, however, is that custody arises only if the restraint on freedom is a certain degree -- the degree associated with formal arrest.

United States v. Bengivenga, 845 F.2d 593, 598 (5th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988).[4] Being "not free to leave" may be necessary to a determination of custody, but it is not sufficient for that determination.

Numerous other jurisdictions have, like Colorado, determined

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[4] Other cases recognizing this distinction include: *Tagala v. State*, 812 P.2d 604, 608 (Alaska 1991) (referring to "not free to leave" as the basis for custody, but stating that "a temporary stop cannot be equated with a formal arrest, even when considerable force is used in effectuating the stop."); *United States v. Carter*, 884 F.2d 368, 379 (8th Cir. 1989) ("The test is not merely whether Carter believed he was free to leave; rather, we must determine whether he reasonably believed that his 'freedom of action [was] curtailed to a 'degree associated with formal arrest.'"); *State v. Hall*, 537 So. 2d 171, 172 (Fla. App. 1989) (citing *Berkemer* for *Miranda* warnings being unnecessary for temporary detentions, so that a more restrictive detention and more coercive circumstances than those is *Berkemer* must be present.); *State v. Toro*, 551 A.2d 170, 172-173 (N.J. Super. 1988), *overruled on other grounds*, 574 A.2d 445, 446 (N.J. 1990) (a traffic stop does not implicate *Miranda*, nor do more substantial restrictions unless those restrictions reach a degree associated with formal arrest.); *State v. Willis*, 494 A.2d 108, 116-117 (Vt. 1985) (citing *Berkemer* for the need for "the functional equivalent of formal arrest," then requiring a determination of whether one was free to leave, but distinguishing *Terry* stops from the incommunicado, police-dominated settings or the functional equivalents of arrest.); *United States v. Streifel*, 781 F.2d 953, 960-961 (1st Cir. 1986) ("Thus, *Berkemer* indicates that, in a non-stationhouse setting, *Miranda* is *not* triggered simply because a person detained by the police has reasonable cause to believe that he is not free to leave; rather, a host of factors must be considered in order to determine whether the 'suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'")

custody based on whether a reasonable person would feel "free to leave," without acknowledging the attention this court gave to arrest in *Beheler*, *Murphy*, and *Berkemer*. *E.g.*, *State v. Torres*, 412 S.E.2d 20, 24 (N.C. 1992) ("It is well settled that the test for whether a person is 'in custody' for *Miranda* purposes is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay."); *Tart v. Commonwealth of Massachusetts*, 949 F.2d 490, 504 (1st Cir. 1991) ("The custody determination ... focuses on whether a reasonable person in the same circumstances would believe he was not free to leave," citing *United States v. Ortega-Santana*, 869 F.2d 12, 14 (1st Cir. 1989), which is a *Terry* stop case applying *Mendenhall*); *United States v. Kirsteins*, 906 F.2d 919, 923 (2d Cir. 1990) (citing *Berkemer* for a focus on whether a reasonable person would have believed he was free to leave); *State v. Blackman*, 377 S.E.2d 290, 292 (N.C. App. 1989) ("In short, 'custody' depends upon whether a reasonable person would have believed he was free to leave the company of the police," citing *Mendenhall*); *State v. Fiocchi*, 553 A.2d 181, 186 (Conn. 1989) (citing *Mendenhall* and "not free to leave" in the context of determining custody); *United States v. Mahar*, 801 F.2d 1477, 1499-1500 (6th Cir. 1986) (determining custody based on whether one would feel "free to leave").

In addition, even other jurisdictions which have recognized the test for custody from *Beheler*, *Murphy*, and *Berkemer*, have nonetheless applied it through reference to whether one would feel "not free to leave." *E.g.*, *United States v. Mitchell*, 966 F.2d 92, 98 (2d Cir. 1992) (citing the test from *Berkemer*, then stating the inquiry under that test to involve indicators of whether the defendant was "free to leave"); *State v. Northrop*, 568 A.2d 439, 443-444 (Conn. 1990) (citing *Mendenhall* for the proposition that custody exists when a reasonable person would have believed he was not free to leave, then citing the test from *Beheler*, then reaching its holding based on the evidence that the defendant was "free to leave"); *State v. Connery*, 441 N.W.2d 651, 655 (N.D. 1989) (after quoting the test from *Berkemer*, stating that to determine whether the initial traffic

stop had escalated beyond a general investigation, "[t]he relevant inquiry is whether a reasonable person in Connery's position would have believed that he was free to leave"); *State v. Dedrick*, 564 A.2d 423, 427 (N.H. 1989), *cert. denied*, 110 S. Ct. 1305 (1990) (citing the test from *Beheler*, but emphasizing the trial court's finding that the defendant "would be justified in concluding he was not free to leave"); *United States v. Chalan*, 812 F.2d 1302, 1306-1307 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988) (citing *Beheler* for its elaboration on *Miranda*, but basing its holding on circumstances suggesting that the defendant was free to leave); *United States v. Phillips*, 812 F.2d 1355, 1360 (11th Cir. 1987) (citing the test from *Beheler*, then combining it with the test from *Mendenhall* by stating the inquiry to be whether the restraint could be characterized as "that 'degree associated with a formal arrest' to such extent that he would not feel free to leave"); *State v. Caruolo*, 524 A.2d 575, 579-580 (R.I. 1987) (citing the test from *Beheler*, but then applying it in terms of whether the circumstances would "suggest to a reasonable person that he was not free to leave").

It goes without saying that one who has been subjected to restraints to a degree associated with arrest is not free to leave. The problem, clearly identified in *Berkemer*, is that there are many other situations in which people may not feel or be free to leave, but which do not implicate *Miranda* because they do not involve a level of police domination associated with arrest. For there to be custody, the reason for being "not free to leave" must be police use of physical force or demonstration of authority to a degree associated with arrest.

This problem is well demonstrated here. This case involves an investigation during which police requested that the suspect answer questions about a crime and the suspect agreed to do so. The police used no words or actions which effected a formal arrest or which otherwise explicitly imposed any restrictions on the suspect's freedom of movement. The suspect made no statements indicating any desire to be free from further questioning or to leave, and therefore the police made no response which would demonstrate that they were

asserting domination contrary to such a desire. Nonetheless, the Court below found that this interrogation was custodial, in large part because it believed that a person questioned by police to confirm their suspicions about his involvement in a crime might feel he was "not free to leave."

It is only in circumstances in which police impose significant restraints that they so dominate the situation that there is the inherently coercive environment which was of concern in *Miranda*. Frequent judicial references to whether one is "not free to leave" without additional guidance do not focus the analysis on whether the police have used physical force or shown authority sufficient to impose restraints to the degree associated with arrest. This allows the determination of custody to be based on the existence of any restraints, even self-imposed ones, which might arise from the apprehension which is inherent when police question a suspect, on whom they have focused their suspicion. Yet this Court has held that such a "coercive environment" is not the equivalent of a custodial setting. *Beheler*, 463 U.S. at 1124; *Mathiason*, 429 U.S. at 495. The result of inquiring whether one in the defendant's position might reasonably feel free to leave rather than whether there are significant restraints (*i.e.* those to a degree associated with arrest) is to expand inappropriately the situations in which *Miranda* is applied.

D. Various Factors Considered by Different Courts In Determining Custody Do Not Properly Direct the Inquiry To Whether Police Have Imposed Restraints to a Degree Associated With Arrest.

Different courts have emphasized different factors as significant for the determination of custody. The Colorado Court stated below that in determining custody, the totality of the circumstances should be considered, including:

> The time, place, and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or non-verbal response to such directions.

Pet. App. at C-6.

Such a list, in the absence of a clear goal for the analysis, does not insure that the determination will in fact be consistent with the concerns of *Miranda*. For example, the Court below emphasized the place of the interview, stating, with no support in the record, that "there can be few places more intimidating or potentially coercive to an individual than one's place of employment..." Pet. App. at C-8 n.10. Even if this assertion were true, such intimidation or potential coercion is due to the relationship between the employer and the employee. It does not establish a use of force or show of authority by the **officer**, and does not, therefore, effect a seizure, much less establish custody. It was likewise improper for the Colorado Court to give prominence to the purpose of the interview as a factor strongly indicating custody, Pet. App. at C-7 n.8, because the desire to obtain a confession is a subjective state of mind, not an application of physical force or a show of authority. Pet. App. at C-15, Mullarkey, J. dissenting.

Other courts have used different lists of factors in efforts to direct the analysis for custody. Many of these factors have been found by this Court to involve inappropriate considerations, such as subjective matters, whether the defendant is a suspect, or whether the investigation has focused on the defendant. **See**, *e.g.*, *Maine v.*

Thibodeau, 475 U.S. 144, 1145 (1986) (Burger, Chief Justice, dissenting from the denial of certiorari) (emphasizing that four of the six factors applied by the Maine Court had been rejected by this Court or other courts, illustrating "an acute need for clarification of the proper factors to be considered in making the 'in custody' determination."); *Delgado v. State*, 840 S.W.2d 594, 598 (Tex. App. 1992) ("Both the United States Supreme Court and the Texas Court of Criminal Appeals still utilize the concepts of 'custody' and 'focus'..."); *Wallace*, 813 S.W.2d at 750 ("Other relevant factors are probable cause to arrest, subjective intent of the police, focus of the investigation, and subjective belief of the defendant"); *Stansbury*, 846 P.2d at 775 ("the most important considerations ... include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of the questioning."); *Furlough*, 797 S.W.2d at 639 ("(1) The nature of the interrogator. (2) The nature of the suspect. (3) The time and place of the interrogation. (4) The nature of the interrogation. (5) The progress of the investigation at the time of the investigation"); **cf.** *Wunder v. State*, 705 P.2d 333, 335 (Wyo. 1985) ("One cannot be in custody of police unless it can be fairly said that his freedom of movement has been involuntarily curtailed by force or immediate threat of force from the police").

The confusion throughout the nation on this issue is demonstrated by the situation in Missouri. In *State v. Middleton*, 854 S.W.2d 504, 513 (Mo. App. W.D. 1993), the Court said, "Missouri case law has been at loose ends because three different tests have been employed to trigger the *Miranda* warning." The court said the three tests were: (1) a "three pronged test," as applied in *State v. Sanad*, 769 S.W.2d 436, 439 (Mo. App. 1989) (*i.e.* whether there was probable cause to arrest, whether the investigation at the time of the interrogation had focused on the accused, and the subjective intent of the police officer); (2) a test based on whether there was reasonable grounds to believe that a crime was committed by the defendant; and (3) a test requiring formal arrest or arrest-like restraints.

Many of these factors, such as the purpose of the interview, the character of the interview, whether the police were accusatory, what the police knew, whether they had probable cause, or the stage of their investigation do not answer the "ultimate inquiry" of whether the police imposed restraints associated with arrest. This is because such factors: (1) do not address whether police acted on what they knew or thought by applying physical force or obtaining submission to their assertion of authority as required for an arrest, see *Hodari D.*, 111 S. Ct. at 1551; (2) involve subjective information in conflict with *Berkemer*, 468 U.S. at 442; or (3) relate to whether the defendant is a suspect upon whom the police have focused in conflict with *Beckwith*, 425 U.S. at 347 and *Mathiason*, 429 U.S. at 495. In addition, many of these factors are inappropriate because (4) police do not have to take a suspect into custody, and have not necessarily done so, just because they have enough information to make an arrest. See *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

E. The Determination of Custody for Purposes of Miranda Is an Issue of Paramount Importance Nationally.

The various tests and considerations for custody do not provide a consistent and appropriate frame of reference for this fundamental matter of Fifth Amendment doctrine. No list of factors will lead to proper results in jurisdictions which, like Colorado, have not clearly acknowledged that the goal of the evaluation of the circumstances is to determine whether police imposed restraints "of a degree associated with arrest." No list of factors will properly confine the analysis, as contemplated by *Miranda* and its progeny, unless it is consciously developed and applied to identify custody in terms of restraints associated with arrest, and not in more general terms. Such tests for custody do not provide the police the guidance they need to determine at the time of the investigation that the circumstances are custodial, so that they can do their difficult work effectively.

In *Miranda* itself, this Court emphasized that the essential custodial setting was that in which there was "incommunicado interrogation of individuals in a police dominated atmosphere." *Miranda*, 384 U.S. at 445. This Court explained that it was this atmosphere which involved "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. This Court has since emphasized that it is such settings, in which the police have isolated and dominated the suspect, for which the *Miranda* warnings were designed and to which they were limited. *Beckwith*, 425 U.S. at 345-347; *Mathiason*, 429 U.S. at 495. This Court has established that such police domination required "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125; *Murphy*, 465 U.S. at 430; *Berkemer*, 468 U.S. at 440.

The wide variety of tests and factors which different courts have adopted for the determination of custody, and the results derived from the application of those tests and factors, demonstrate that many courts still do not recognize *Miranda's* "own explicitly stated rationale" *Beckwith*, 425 U.S. at 345, *i.e.* that it is only police dominated environments "to which *Miranda* by its terms was made applicable, and to which it is limited." *Mathiason*, 429 U.S. at 495. As demonstrated by this case, the Colorado courts find custody under circumstances which do not involve the degree of restraints required by this Court for there to be custody, so that inculpatory statements are often suppressed inappropriately. Such an expansive approach to defining when interrogation is custodial "ignores both *Miranda's* mission and its only source of legitimacy" and interferes unnecessarily with "the need for police questioning as a tool for effective enforcement of criminal laws" by suppressing admissions of guilt made in a wide variety of circumstances having little resemblance to actual custody, even though such admissions "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 425-426 (1986).

This Court has recently granted a defendant's petition for writ of certiorari to address a related *Miranda* issue involving the determination of custody. *Stansbury v. California*, No. 93-5770, *cert. granted* (U.S. Nov. 1, 1993). The different approaches taken by the California Supreme Court and the Colorado Supreme Court demonstrate the confusion nationally with regard to the determination of custody. *Stansbury* presents the more narrow issue of whether subjective considerations, involving when police suspicion has focused on the defendant so that he was considered a suspect and not a witness, were an inappropriate basis for the determination of custody. This case raises the broader and more general issue of the relationship of restraints associated with arrest to the definition of custodial interrogation. That case and this one both involve custody, but under very different fact situations and very different legal standards. This case is, therefore, a very effective complement to *Stansbury*. Consideration of both of these cases would allow for much more comprehensive attention to, and resolution of, this important issue.

CONCLUSION

The Colorado Court erred in its determination of custody in at least three ways. It gave "talismanic effect" to the second phrase from the definition of custodial interrogation in the original *Miranda* decision. It ignored this Court's repeated references, since *Miranda*, to arrest to describe the significant degree of restraints which are necessary to trigger the *Miranda* requirements. And it emphasized feeling "not free to leave" as the "essential" element for custody, even though that is the test for lesser seizures than arrests, which this Court has said do not implicate *Miranda* at all.

Based on similarly inappropriate analysis, courts across the country have been inconsistent with each other and with the decisions of this Court in their approaches to custody for purposes of *Miranda*. The Colorado Court and many others have not recognized that *Miranda* was concerned with those settings in which police have

imposed restraints which are to the degree associated with arrest, thereby isolating and dominating the person they interrogate. Within these jurisdictions, compliance with *Miranda* is often required under a much wider range of circumstances than concerned the *Miranda* Court itself, with the result that many reliable admissions are inappropriately kept from the fact-finder.

It is respectfully requested that this Court grant this petition and review the holding of the Colorado Supreme Court to eliminate this widespread confusion in the application of *Miranda*.

Respectfully Submitted,

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APPENDIX A

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 92CR601-4

MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

PEOPLE OF THE STATE OF COLORADO, Plaintiff

v.

LESLIE LAFRANKIE, Defendant

Mr. LaFrankie moves to suppress any and all evidence and statements alleged to have been made by Mr. LaFrankie relating to crimes charged herein on grounds that said evidence and statements were involuntary, in violation of Mr. LaFrankie's right to the assistance of counsel, the product of an illegal arrest or illegal search and seizure, in violation of Rule 5 of the Colorado Rules of Criminal Procedure, without adequate warning of rights, without valid waiver of rights, and were otherwise obtained in violation of Mr. LaFrankie's rights under the Colorado Rules of Criminal Procedure and Statutes and Constitutions of the United States and the State of Colorado. This motion is based on the following:

1. On April 10, 1992, Mr. LaFrankie was interviewed by Detectives Lee Brian Scott and Pat Goecke of the Longmont Police Bureau. Mr. LaFrankie was not advised of his rights per *Miranda*. Mr. LaFrankie initially denied involvement. Detectives Scott and Goecke continually browbeat Mr. LaFrankie for approximately thirty minutes. The Detectives used unlawful and coercive tactics to elicit incriminating statements from Mr. LaFrankie. The Detectives implied judicial leniency would follow if Mr. LaFrankie confessed.

2. The totality of the circumstances created a de facto custody situation. Responses form Nr. LaFrankie were clearly the product of interrogation. Therefore, the requirements of the *Miranda* decision and it's progeny apply.

3. Following incriminating statements by Mr. LaFrankie, the police obtained permission to search Mr. LaFrankie's home. All evidence seized as a product of this search were the direct fruits of the illegal conduct by the officers in coercing a confession and coercing Mr. LaFrankie's cooperation with the search.

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APPENDIX B

DISTRICT COURT
COUNTY OF BOULDER
STATE OF COLORADO

Action No. 92CR601

REPORTER'S TRANSCRIPT **November 30, 1992**

The People of the State of Colorado,

People,

vs.

L.B. LaFrankie,

Defendant.

The Motions Hearing in this matter commenced on November 30, 1992 before the HONORABLE JOSEPH J. BELLIPANNI, Judge of the District Court in and for the County of Boulder, State of Colorado.

For the People: Mr. Steve Louth

For the Defendant: Mr. John Lucas

THE COURT: The first question before the Court is whether-or-not there was custodial interrogation and the standard of determining whether-or-not there is custodial interrogation is whether a reasonable person in the defendant's position would have considered himself deprived of his freedom of action in a significant manner during a police interrogation in which the defendant is exposed to a risk of self incrimination. The facts of the interrogation are as follows, the defendant was asked questions so I don't think there is an issue about whether there was an interrogation. The question is whether-or-not there was custody. Those questions were asked during a 30 minute interview at the defendant's place of work. It was conducted in a room that was about 15 by 15. There was no one else there besides the defendant and the two officers. The officers did not advise the defendant of his rights pursuant to *Miranda*. The Court has a transcript of the investigation and interrogation and the Court's conclusion, based upon its review of the transcript and the testimony, is that the officers were there to get the defendant to tell them that he stole this computer. That is what this is about. This is not an interview in which the officers are there to obtain information. It's clear from the tone of the interrogation that they have already come to the conclusion that he is the person who did it. You wouldn't tell people that you knew they were lying or you thought they were lying or things would go easier on them if they told the truth unless you were pretty much convinced that you had the person who stole the computer. So, the tenor of the entire 30 minute conversation is clearly that the defendant is a person who stole the computer and why doesn't he just tell the truth. So, it is accusatory in its tone, clearly. The other pieces of information that are significant in determining whether a reasonable person would have determined that his freedom of movement had been significantly affected, include whether he is told that he is free to leave. In this case, he has not been told that he was free to leave. At no time was he told that he was free to leave. That distinguishes the case from Horn except it distinguishes it in the way in which the prosecution would not like it distinguished. In Horn in which the Court found that the

defendant was in custody and that the determination was affirmed by the Supreme Court, the defendant was told that he was free to leave and the Court felt that that was still insufficient, given the other facts that were present. Here, the other facts that are present that are significant are as follows, the defendant is accused of lying on several occasions. During the course of the interview, the defendant--the issue of the polygraph exam is discussed. It's discussed and the officers tell him that he would fail a polygraph exam because he is lying. He is told that he should tell the truth because it's better to tell the truth than to lie and the Judge would be easier on him if he told the truth. Those things are true but the issue is not whether-or-not the truth is being told but the issue is whether-or-not the defendant, who is sitting there listening to this, gets the idea he is free to get up and walk out the door or he believes he is not free to get up and walk out the door He is told that he wouldn't be taken into custody unless he committed a murder and so that fact weighs against finding that he is in custody. He understands that he is not going to be taken to the jail at that time but that is also the case in Horn. He is also told in Horn that, well, charges will be filed against him, he won't be taken into custody that day and he was told that he is free to leave. The Court's view of the encounter indicates to the Court that since the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. That is what *Miranda* is about, otherwise, *Miranda* doesn't mean anything. I mean there needs to be a time when a person is advised of their rights. You don't need to do it when you are investigating and you are asking questions and you are trying to figure out what is going on. You don't need to do it if the person can walk away from you and the objective test is whether the person can figure that out. In this case, the Court believes there was custodial interrogation. There weren't any warnings pursuant to *Miranda* and, therefore, the statements made by the defendant should be suppressed. There is a further

issue of voluntariness and the test for voluntariness is based on the totality of the circumstances and there are many things to determine whether-or-not the statement is involuntary, pursuant to law. The Court has found that he was in custody and he was not free to leave and he was not aware he was free to leave. There were not *Miranda* Rights given to the defendant. The statements that were made inculpatory were made during the course of the interrogation and not volunteered. The Court doesn't believe there were threats made in the sense of consequences that would occur to the defendant if he didn't tell the officers what they wanted to hear. There were statements of truth made and the Court doesn't believe that statements of truth create involuntary statements on behalf of the defendant. The officers are telling the truth when they say that, "it's probably going to be easier on you if you admit." They are telling the truth about the way in which--how he might feel better if he told the truth, those kinds of things, how it might go better for him, all those things are the truth and the Court doesn't believe those are threats or promises. The statements made about any promises, there is some implied issues about things going easier for you if you testify--if you tell the truth than if you don't but the Court doesn't believe those are the kinds of promises that rise to a level of overboring somebodys will in order to get their statements and making the statements involuntary. There are certainly no overt threats or promises. The style used by the questioners was an approach which was low-keyed, in the Court's view, in the sense of certainly there isn't a beating or yelling or all of those kinds of things that could have happened and the Courts have recognized maybe the soft approach is inappropriate sometimes as well but there is no indication this is a defendant that is particularly susceptible, excuse me, to mental coersion. The technique was a technique which was fairly low key and that is not going to be calculated to overbore somebodys will as well as there is no evidence before the Court that would indicate that the defendant's physical or mental condition was utilized in any inappropriate manner. He is a person who works with computers, has some sophistication. He has some significant history with the

criminal justice system. He has been advised of his rights in a prior case and, therefore, has heard that he has a right to remain silent and not testify and he has been advised of that during the course of entering a plea to a charge in the past. All of those factors put together, the totality of the circumstances lead the Court to the conclusion that the statements are not involuntary as required, as defined under the law and, therefore, the Court does not believe that the statements were the product of involuntary interrogation. So, the Court is not going to--for other purposes that may be used during the course of the trial, the Court rules that the statements are not involuntary.

REPORTER'S CERTIFICATE

I, Sharon Garone, Certified Shorthand Reporter within and for the Boulder District Court, County of Boulder, State of Colorado, do hereby certify that I was present at and reported on the Stenograph Machine the Hearing in the above-mentioned matter; that the foregoing seven pages, including this page, contain all of the testimony and findings of fact at said Hearing and the same is a true and correct transcript, as requested.

_____

Sharon Garone, CSR

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 92SA476 October 4, 1993

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff/Appellant,

v.

LESLIE BENJAMIN LaFRANKIE,

Defendant/Appellee.

Interlocutory Appeal for the District Court, Boulder County
Honorable Joseph J. Bellipanni, Judge

EN BANC **RULING AFFIRMED**

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Twentieth Judicial District
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David F. Vela, Colorado State Public Defender
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Attorneys for Defendant/Appellee

JUSTICE SCOTT delivered the Opinion of the Court. JUSTICE MULLARKEY dissents. CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK join in the dissent.

The People bring this interlocutory appeal pursuant to section 16-12-102(2), 8A C.R.S. (1986), asking that we reject the determination of the trial court and reverse its order suppressing statements made to the police by the defendant. After examining the totality of the circumstances, the district court concluded that because the defendant was interviewed by the police for the purpose of obtaining a confession and because the defendant reasonably believed he was not free to leave, the defendant was subjected to a custodial interrogation. For these reasons, and due to the fact that the police failed to advise the defendant of his *Miranda* [5] rights, the district court granted the defendant's motion to suppress. We find sufficient evidence to support the trial court's determination that defendant's statements were made in the course of a custodial interrogation, and accordingly we affirm.

I.

On April 10, 1992, the defendant below, Leslie Benjamin LaFrankie (LaFrankie), was questioned by two Longmont police detectives regarding the theft of a computer from LaFrankie's place of employment, High Tech Manufacturing (High Tech). The detectives, Lee Brian Scott and Pat Goeke, singled out LaFrankie for questioning based on information provided by management personnel at High Tech who suspected that LaFrankie had committed the theft because LaFrankie had access to the computer and had made suspicious statements to High Tech personnel.

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The detectives arrived at High Tech at about 3:00 p.m. and spoke briefly with High Tech's management personnel, including its president. After meeting with the police officers, a High Tech manager was dispatched to escort LaFrankie, who was working on the production floor, to the main administrative area where the detectives were waiting in an area just outside the president's office. Upon LaFrankie's arrival, the detectives identified themselves and, in the presence of High Tech's management staff, asked LaFrankie if he "had a few minutes to talk." LaFrankie, stating that he wanted to get the matter straightened out, agreed to meet with the officers.

Still in the presence of the management staff, the detectives were directed to the president's office so that they could speak privately with LaFrankie. Officer Scott described the office as "very large" (fifteen feet by fifteen feet) and "well-lit." The detectives closed the office door and began their questioning.[6] One detective sat in a chair next to LaFrankie and the other sat about six feet away. Both detectives were armed but no weapons were visible. Officer Scott began the interview by explaining to LaFrankie that people frequently made mistakes and that the best thing to do was to try and rectify the mistake once "you realize your error." Officer Scott stated that he believed LaFrankie had knowledge of the recent computer theft because LaFrankie had made statements regarding the theft before anyone else at the plant, except the president and general manager, knew about the incident. LaFrankie denied knowing anything about the whereabouts of the stolen computer. Officer Scott then asked LaFrankie if he would consent to a search of his house. LaFrankie said he would allow such a search and admitted that the officers would find a computer there, but said he did not believe that the computer at his house

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[6] The interview was tape-recorded without LaFrankie's knowledge. The tape and a transcript of the interview were admitted into evidence at the suppression hearing.

was the one stolen from the office. In apparent disbelief, Officer Scott told LaFrankie that he was acting "as nervous as a cat on a hot tin roof." LaFrankie then explained he was nervous because he had recently purchased a computer from a garage sale for $200 and it was possible that the computer he purchased was the one that had been stolen from the plant. Officer Scott again indicated disbelief at LaFrankie's story and told LaFrankie he thought he was lying. The majority of the interview was conducted in a similar fashion. For example, Officer Scott told LaFrankie not to worsen his mistake by lying; that LaFrankie would fail a polygraph test because he was lying; that LaFrankie had "a big bright sign on [his] forehead that says you made a mistake here"; that LaFrankie's story was too coincidental to be believed; that LaFrankie looked nervous and sweaty -- as if he were lying; that LaFrankie could be used as a "poster boy for lying"; and that LaFrankie had insufficient funds in his checking account to purchase a computer for $200 cash. Nonetheless, LaFrankie steadfastly maintained his innocence through most of the interrogation.

However, after about thirty minutes of this type of questioning, LaFrankie confessed to having stolen the computer. In the course of the closed-door interview, LaFrankie was never informed that he was free to leave or that he was not in official custody. Neither Officer Scott nor Officer Goeke advised LaFrankie of his *Miranda* rights before or during the interview. Immediately before he confessed, however, LaFrankie was informed that if he admitted his participation he would not be arrested and put in jail that night, but that a felony summons would be issued in six weeks if charges were to be filed against him. After confessing to the theft, LaFrankie led the detectives to his home and allowed them to search his home to recover the stolen computer.

LaFrankie was charged with theft of a thing of value of $300 or more, in violation of section 18-4-401(1)(a), 8B C.R.S. (1986). On May 27, 1992, he was served with a summons to

appear. He subsequently filed a motion to suppress his confession and the evidence obtained as a result of his April 10 interview with Officers Scott and Goeke. After a hearing on November 30, 1992, the district court granted LaFrankie's motion to suppress, finding that LaFrankie was subjected to a custodial interrogation without having been advised of his *Miranda* rights. We affirm the order of the district court granting LaFrankie's motion to suppress.

II.

Under *Miranda v. Arizona*, 384 U.S. 436, 444, 478, 479 (1966), evidence obtained as the result of a custodial interrogation may not be used against a defendant unless, prior to questioning, the defendant is warned that he has the right to remain silent, that any statement he makes may be used as evidence against him, that he has the right to have an attorney present, and that he has the right to have an attorney appointed for him if he cannot afford one. See *Jones v. People*, 711 P.2d 1270, 1275 (Colo. 1986) (statements made during custodial interrogation are admissible only if defendant was given a *Miranda* advisement). Here, there is no dispute that LaFrankie was not advised of any of these rights. Thus, if the interview in question constituted "custodial interrogation," the evidence obtained as a result of the interview must be suppressed. *People v. Horn*, 790 P.2d 816 (Colo. 1990).

"Interrogation" refers to words or actions "on the part of the police officer that the officer 'should know are reasonably likely to elicit an incriminating response from the suspect.'" *People in Interest of J.C.*, 844 P.2d 1185, 1189 (Colo. 1993) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). Here, it is undisputed that the interview in question was designed to elicit incriminating information from LaFrankie. Thus, the only question is whether the interrogation was custodial in nature.

Custody is not limited to those situations in which a formal arrest has taken place, but also includes those situations where the

person interrogated "has been significantly deprived of his freedom of action." *People v. Trujillo*, 784 P.2d 788, 791 (Colo. 1990). An interrogation is custodial if a reasonable person in the suspect's position would believe that he is deprived of his freedom of action in any significant way. *Horn*, 790 P.2d at 818; *accord People v. Cleburn*, 782 P.2d 784, 786 (Colo. 1989). In determining whether a reasonable individual in the same situation would feel significantly deprived of his freedom of action, a court must consider the totality of the circumstances surrounding the interrogation, including the following factors:

> [t]he time, place and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

People v. Thiret, 685 P.2d 193, 203 (Colo. 1984), *quoted in Horn*, 790 P.2d at 818 and *Trujillo*, 784 P.2d at 791.

The issue of custody is "essentially a factual question that involves a trial court's assessment of the credibility of witnesses and a weighing of their testimony." *Trujillo*, 784 P.2d at 792. Our role on appeal, therefore, is to "determine whether the trial court's findings of historical fact are adequately supported by competent evidence and whether the court applied the correct legal standard to these findings in resolving the issue before it." *Id.* A trial court's findings of fact will not be reversed on appeal when

supported by competent evidence and when the trial court applied the correct legal standard. *Horn*, 790 P.2d at 818.

In the instant case, the People allege that the district court focused on the interviewing detectives' desire to extract a confession, to the exclusion of other factors which should have been considered as part of the "totality of the circumstances." As evidence that the district court erroneously based its finding of custody on the detectives' admitted desire to elicit a confession, the People point to the following passage from the court's order:

> [T]he encounter indicates to the Court that since the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. [O]therwise *Miranda* doesn't mean anything.

We agree that this excerpt from the district court's order, when read alone, may be misleading since it could be interpreted to require a *Miranda* advisement whenever the purpose of an interrogation is to gain a confession.[7] The court's order, however, clearly sets forth the standard established by our precedent for determining whether the defendant was subjected to a custodial interrogation, *i.e.*, that "a reasonable person in the defendant's position would have considered himself deprived of his freedom of action in a significant manner during a police interrogation."

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[7] While the purpose of an encounter is one of the prominent factors which should be considered in determining if a reasonable person would feel deprived of his freedom of action in a significant way, *see Thiret*, 685 P.2d at 203, we do not today establish a *per se* rule whereby a *Miranda* advisement is required any time a police officer's actions are motivated by the desire to obtain a confession or other information from a suspect.

Moreover, the court's conclusion that the interrogation was custodial is based on factors other than the motivation behind the detectives' questioning of LaFrankie. In reaching its decision, the court focused on the totality of the circumstances surrounding the interview, including the "accusatory tone" used by the detectives [8] and the fact that the detectives never told LaFrankie that he was free to leave. Additionally, the court noted that the interview took place at LaFrankie's place of employment; that the interrogation took place in the president's office in a 15-by-15 foot room;[9] that

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[8] On at least ten different occasions the detectives expressed disbelief at LaFrankie's statements. At one point, Officer Scott told LaFrankie, "Listen to me, Ben. Don't blow smoke at me, cause I'm going to find out, okay." In another instance Officer Scott told LaFrankie, "you have a big bright sign on your forehead that says you made a mistake here." Additionally, Officer Goeke told LaFrankie "we could use you as a poster boy for lying."

[9] Although the interrogation by Officers Scott and Goeke did not take place at the station house, there can be few places more intimidating or potentially coercive to an individual than one's place of employment. This is especially true when the employee is first confronted in the presence of senior management, escorted to the president's office, interviewed while the door is closed, and never informed that he is free to leave. **See**, *e.g.*, *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989) (holding that a bank employee questioned by police in bank president's office was subjected to custodial interrogation); *United States v. Nash*, 563 F.2d 1166 (5th Cir. 1977) (finding custodial interrogation where suspect was taken to security office at his place of employment by his supervisor, interrogated by an FBI agent for 45 minutes with the office door closed, and was not informed that he had the right to leave the office); *United States v. Phelps*, 443 F.2d 246 (5th Cir. 1971) (interrogation custodial where police questioned suspect at his place of business); **cf.** *United States v. Dockery*, 736 F.2d 1232 (8th Cir. 1984) (police questioning of defendant at place of employment not custodial where defendant initiated interview and was told that she did not have to answer any questions, that she was not under arrest, and that she was free to leave at any time). While the place of interrogation is significant, it is not controlling. **See generally** 1 Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 6.6 (1984) (questioning has been held to be noncustodial where it occurred at a place of employment, however the circumstances of the particular case need to be carefully assessed; police

the only people in the room were the two police officers and LaFrankie; that the interview lasted for thirty minutes; that LaFrankie was accused of lying on several occasions; that LaFrankie's statements were "not volunteered"; and that LaFrankie was told he would fail a potential polygraph test.

We hold that this evidence is competent to support the order of suppression. Our decision is supported by *People v. Horn*, 790 P.2d 816 (Colo. 1990), where we found the evidence of custodial interrogation sufficient to support the trial court's suppression order. As in the instant case, in Horn we noted the significance of the following facts: the interview was "accusative from the outset" (the defendant was accused of lying at least five times); during the course of the interview the defendant was urged to take a polygraph exam and encouraged to confess for the therapeutic value of the confession; the interview was conducted in an 8-by-12 foot room; the interview lasted for about thirty minutes; only the interrogating officer and defendant were present; and the sole purpose of the questioning was to obtain a confession from the defendant. *Id.* at 818-19. Additionally, unlike the instant case, the defendant in Horn was "repeatedly told that he was free to leave."[10] *Id.*

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interviews were held to be custodial where an employee was marched off to a security office of his employer, or where a suspect was put into a police-dominated situation).

[10] In *Horn*, the interview took place at the police station. Although this fact certainly supports a finding of custody, it is not conclusive. *United States v. Hudgens*, 798 F.2d 1234 (9th Cir. 1986); *Graham v. State*, 535 N.E.2d 1152 (Ind. 1989); *State v. Perkins*, 444 N.W.2d 34 (S.D. 1989). Moreover, in *Horn*, it does not appear that either the district court or this court emphasized the location of the interview more than any other factor in determining the existence of custodial interrogation. *Horn*, 790 P.2d at 818-19.

Finally, we believe that the district court applied the correct legal standard in resolving the case before us. At the outset of its order the court stated that the standard for determining custodial interrogation is whether "a reasonable person in the defendant's position would have considered himself deprived of his freedom of action in a significant manner," almost a verbatim restatement of the standard utilized in *Horn*, *Trujillo*, and *Cleburn*. *See* discussion *supra*, pp. 5-6. And in concluding that LaFrankie was in custody, the court stated as follows:

> I mean there needs to be a time when a person is advised of their rights. You don't need to do it when you are investigating and you are asking questions and you are trying to figure out what is going on. **You don't need to do it if the person can walk away from you and the objective test is whether the person can figure that out**. In this case, the Court believes there was custodial interrogation.... **The Court has found that he was in custody and ... he was not aware he was free to leave**.

(Emphasis added). Thus, it appears that the court was well aware of the proper legal standard and correctly applied that standard to the totality of the circumstances in making its determination.

III.

In summary, we agree with the district court that LaFrankie was subjected to custodial interrogation, without having been advised of his rights pursuant to *Miranda*. The district court considered the totality of the circumstances, including the purpose of the interview, the words used by the officers, the setting and duration of the interview, and the fact that LaFrankie was never informed that he was free to leave the interview, and, in doing so,

found that the interrogation of LaFrankie was custodial. In reaching this conclusion, the court applied the correct legal standard, *i.e.*, whether a reasonable person in the suspect's position would feel significantly deprived of his or her freedom of action. Thus, we affirm the order of the district court suppressing statements and evidence obtained as a result of the April 10 custodial interrogation of the defendant.

JUSTICE MULLARKEY dissents. CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK join in the dissent.

JUSTICE MULLARKEY dissenting:

I respectfully dissent.

The majority holds that the trial court's suppression of statements and evidence obtained as a result of the interview by the police of the defendant on April 10, 1992, is appropriate because the trial court correctly found that the defendant was subjected to a custodial interrogation without having been advised of his *Miranda* [1] rights. I disagree with the majority's conclusion. The trial court's excessive reliance on the "accusatory" state of mind of the interviewing officers in its determination that the defendant was in custody, combined with what the majority opinion accurately describes as the court's "misleading" view of *Miranda*, demonstrate that the trial court did not correctly apply the appropriate legal standard to the findings of fact. I would reverse and remand with directions to apply the correct legal standard for determining when a police interrogation is custodial in nature.

I

The record in this case reveals that when officers Scott and Goeke asked the defendant if he would speak with them, the defendant agreed and stated that he wanted to "get the matter straightened out." The officers then interviewed the defendant in the company president's office for approximately thirty minutes. During that time, the defendant was not advised of his *Miranda* rights nor was he informed that he was either under arrest or free to leave. When the defendant asked the officers what would happen if the computer at his house was the one which was stolen, he was informed that he would not be taken into custody, but that a felony summons would be issued in about six weeks. The

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

defendant later testified in the suppression hearing that he felt compelled to remain in the office with the police officers for two reasons: first, because of the general intimidation caused by the presence of two police officers, and second, because company management wanted him to speak with the officers.

The trial judge's order describes the issue in this case as whether or not the defendant was in custody at the time of the interview. The order then lists several factors weighed by the court in deciding the custody issue, with special emphasis upon the fact that the officers spoke in an "accusatory" tone and that they repeatedly expressed to the defendant that they believed him to be lying. In the trial court's view, it was "clear from the tone of the interrogation that they have already come to the conclusion that he is the person who did it." After stating that "the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about," the court concluded that there was custodial interrogation and that the statements should be suppressed.

Contrary to the impression generated by the majority opinion the trial court's order does not end there. Rather, the order proceeds to discuss in detail the separate issue of whether the defendant's responses during the interview were voluntary, that is, whether they were the product of coercion or threats by the police. The trial court made several findings of fact on this issue:

> **The Court does not believe that there were threats made** in the sense of consequences that would occur to the defendant if he didn't tell the officers what they wanted to hear. There were statements of truth made and the Court doesn't believe that statements of truth create involuntary statements on behalf of the defendant. The **officers are telling the truth when they say that, "it's probably going to be easier on you if you**

> **admit....**" There are certainly no overt threats or promises. **The style used by the questioners was an approach which was low-keyed**, in the Court's view, in the sense of certainly there isn't a beating or yelling or all of those kinds of things that could have happened.... The technique was a **technique which was fairly low key and that is not going to be calculated to over[bear] somebody's will** as well as there is no evidence before the Court that would indicate that the defendant's physical or mental condition was utilized in any inappropriate manner.... All of those factors put together, the totality of the circumstances lead the Court to the conclusion that the statements are not involuntary ... and, therefore, the **Court does not believe that the statements were the product of involuntary interrogation**.

(Emphasis added).

The trial court order does not attempt to reconcile its apparently conflicting descriptions of the interview: on the one hand, the trial court found the conversation was highly "accusatory" when viewed as a custody question, yet, on the other hand, it found that the same conversation involved only true statements, was "low key" and was not "calculated to over[bear] somebody's will" when viewed as a voluntariness question.

II

The test for determining whether a person is in a custodial setting is "whether a reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way" during a police interrogation in which the defendant was exposed to the risk of self-incrimination. *People v.*

Probasco, 795 P.2d 1330, 1334 (Colo. 1990); *People v. Milhollin*, 751 P.2d 43, 49 (Colo. 1988). A court must examine the totality of the circumstances on a case-by-case basis to determine whether the *Miranda* protections apply. *People v. Wallace*, 724 P.2d 670, 673 (Colo. 1986); *People v. Thiret*, 685 P.2d 193, 203 (Colo. 1984). While courts are to consider factors such as the purpose of the encounter and the tone of voice and general demeanor of the interviewing officer, *id.* at 203, we have held that the police officer's subjective state of mind is not an appropriate standard for determining whether an individual has been deprived of his freedom of movement in a significant way. *Wallace*, 724 P.2d at 670, 673; *People v. Black*, 698 P.2d 766, 768 (Colo. 1985); *People v. Johnson*, 671 P.2d 958 (Colo. 1983).

Although the trial court, at the outset of its order, correctly states this objective test for deciding whether the defendant was in custody, the remainder of the order raises serious doubts as to whether the court correctly applied that test in this case. First, the court was clearly laboring under the false assumption that custody is triggered for *Miranda* purposes whenever a police interview is designed to elicit a confession.[2] The problem with such a view of *Miranda* is that it shifts the focus of the custody inquiry from the objective test of what a reasonable person in the defendant's

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[2] The relevant passage of the trial court's order reads as follows:

> The Court has a transcript of the investigation and interrogation and the Court's conclusion . . . is that the officers were there to get the defendant to tell them that he stole this computer. This is what this is about. . . . The Court's view of the encounter indicates to the Court that since the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. That is what *Miranda* is about, otherwise, *Miranda* doesn't mean anything.

situation would believe, to a subjective inquiry, previously rejected by this court, into the state of mind of the interviewing officers. See, *e.g.*, *Black*, 698 P.2d at 768; *People v. Corley*, 698 P.2d 1336, 1339 (Colo. 1985) (finding no custodial interrogation despite fact that the investigating officer "focused" on the defendant as a suspect).

The majority opinion finds the trial court's "misleading" view of *Miranda* harmless in light of that court's apparent reliance on other factors. The record reveals otherwise. The majority, for example, points out that the trial court clearly considered the "accusatory tone" of the interview as a key factor in its decision. The trial court order, when read in its entirety, reveals, however, that while the police officers communicated their belief that the defendant was lying to them, they did so in a "low-keyed" manner. Moreover, the officers followed such accusatory statements with what the trial court deemed to be "statements of truth," such as that the defendant would benefit from being honest with the police. The trial court described the interview technique as a "soft approach" that was not "calculated to over[bear] sombody's will." Finally, unlike in *People v. Horn*, 790 P.2d 816 (Colo. 1990), where the interviewing officer informed the defendant that charges would be filed against him regardless of the defendant's responses, the record here reveals that despite the police officers' accusatory tone, LaFrankie was told that he would not be taken into custody "unless he committed a murder."

The trial court's focus on the "accusatory" tone and content of the interview in its analysis of the custody issue, when contrasted with its approval of the officers' "soft approach" under its voluntariness analysis, suggests that the trial court's misreading of *Miranda* fatally infected its reasoning in this case. That is, the trial court appears to have decided the custody issue based almost exclusively upon its conclusion that the police officers intended from the outset to procure a confession. The majority, however, cites several other "factors" mentioned in the order as examples of

the trial court's correct application of the objective custody test. For example, the majority points to the fact that the trial court described the interview as transpiring in the president's office in a fifteen- by-fifteen foot room. While the majority chose to view that fact as highly relevant to the custody decision, finding "few places more intimidating or potentially coercive to an individual than one's place of employment," maj. op. at 9 n.5, there is no indication anywhere in the record that the trial court placed a similar gloss on the office dimensions.[3] Indeed, the majority's assumption that one's work place is somehow inherently "intimidating" and "potentially coercive" is a false generalization and not an accurate statement of the law.[4] Moreover, the majority

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[3] The majority emphasizes the factual similarities between this case and *Horn*, citing, among other things, the dimensions of the interview room in each case. Upon closer inspection, however, the two cases are distinguishable in important ways. For example, the majority cites the eight-by-twelve foot dimensions of the room in *Horn* as indicative of the fact that the trial court in this case must have found the fifteen-by-fifteen foot dimensions relevant in its analysis of the custody issue. The majority fails to mention, however, some key facts in *Horn* that distinguish it from the case at hand: in *Horn*, the trial court specifically pointed out that the eight-by-twelve foot room was "windowless" and "located in a secured area of the basement of the police station." *Horn*, 790 P.2d at 819. No such additional information is provided in the trial court order in this case.

[4] The relevant federal precedent rejects such a sweeping view of the employment context in custody analysis:

> The place where an interrogation takes place does not conclusively establish the presence or absence of custody. A deprivation of freedom may take place at one's home as well as at the police station. *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L. Ed. 2d 311 (1969). By the same token, an interrogation at the police station may be noncustodial. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L. Ed. 2d 714 (1977). . . . Determining if there has been a deprivation of freedom entails something more than simply identifying the place of interrogation.

opinion omits to mention the fact that the defendant testified that he remained in the office with the police largely due to the fact that the company managers for whom he worked asked him to cooperate with the investigation. Where normal employment obligations give rise to restrictions on an employee's freedom to move, such restrictions will not in themselves support a finding that the employee is in custody. *Probasco*, 795 P.2d at 1334-1335; *accord Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by actions of law enforcement officials . . . but by the workers' voluntary obligations to their employers."); *United States v. Dockery*, 736 F.2d 1232 (8th Cir.), *cert. denied*, 469 U.S. 862 (1984) (finding a bank employee not in custody when ordered by her employer to accompany F.B.I. agents to an office as part of an investigation into bank embezzlement). In this case, the defendant consented to speaking with the police at the request of his employer, and a reasonable employee in the defendant's situation would have believed that he was "simply following the orders of a superior in his place of employment." *Probasco*, 795 P.2d at 1334. As such, he would not be in custody for *Miranda* purposes by virtue of his belief that his employer expected him to cooperate.

Finally, the majority cites other facts mentioned in the order, such as the thirty minute duration of the interview and that the only people present at the interview were the defendant and the two police officers, maj. op. at 9-10, to support its view that the trial court correctly applied the objective custody test. Unfortunately, however, such facts are not analyzed or commented upon in the trial court order as weighing either for or against a

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United States v. Jones, 630 F.2d 613, 615 (8th Cir. 1980), quoted in *United States v. Carter*, 884 F.2d 368, 371 (8th Cir. 1989).

determination that the interrogation was custodial.[5] Rather, the trial court's only explicit analysis of specific facts for purposes of custody determination can be found in two instances: first, when the court explains that the police officers' statement to the defendant that he would not be taken into custody unless he committed a murder "weighs against finding that he is in custody," and second, when the court erroneously states that custodial interrogation is triggered by police intent to procure a confession.

III

In summary, the record fails to support the conclusion that the trial court applied the correct legal standard to the facts in this case. Because I believe the trial court did not apply the correct legal standard, it is not necessary to reach the issue of whether or not the trial court's decision to suppress the relevant statements was "adequately supported by competent evidence." *People v. Trujillo*, 784 P.2d 788, 792 (Colo. 1990). The various "factors" cited by the majority as proof that the court correctly applied the appropriate test are overshadowed by the trial court's erroneous view of *Miranda*. The record shows that the trial court was more concerned with the subjective state of mind of the police than what a reasonable person in the defendant's situation would have believed. The only factors upon which the trial court undisputedly relied in making its custody determination were the facts that the police intended from the outset to procure a confession and that the police spoke to the defendant in an "accusatory tone." Those two

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[5] Once again, *Horn* provides an important contrast to this case. In *Horn*, for example, the trial court explained that the thirty minute duration of the interview was significant "because of the highly confrontational nature of the encounter." *Horn*, 790 P.2d at 819. In light of the "soft approach" taken by the police in the present case, the relevance of the thirty minute duration is at best unclear.

factors, by themselves, cannot support a finding that the interrogation was custodial in nature.

For the foregoing reasons, I respectfully dissent.

I am authorized to say that CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK join in this dissent.